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New NEPA Guide for Acquisition Programs - MAJ Polchek

The Office of the Assistant Secretary of the Army for Research, Development, and Acquisition has issued a new guidance document for integrating National Environmental Policy Act (NEPA) analysis into weapons system acquisition activities. The Planning Group for Environmental Requirements, NEPA, and the Weapon System Acquisition Process Initiative prepared the document, entitled *Managing the Environmental Risk: Applying the Environmental Analysis Process of the National Environmental Policy Act to Weapon System Acquisition Programs,* June 1996.

The document is intended to be a guide to fulfill the environmental analysis requirements of Department of Defense (DoD) Directive 5000.1 and DoD Regulation 5000.2-R. DEPARTMENT OF DEFENSE DIRECTIVE 5000.1, DEFENSE ACQUISITION, (21 FEB. 1996), and DEPARTMENT OF DEFENSE REGULATION 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATED INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS, (21 FEB. 1996). The acquisition community will use the new directives to integrate NEPA analysis into a weapon system program's mission, organizational structure, and activities.

The guidance recommends use of environmental analysis to manage environmental risk in the acquisition program. The guidance states that NEPA should be used within the integrated product team (IPT) framework to ensure a coordinated, multi-disciplinary approach. The guidance further recommends that NEPA be integrated into each phase of the acquisition program in order to increase awareness of environmental concerns throughout the decision process.

Discriminatory Fees Under the CAA - LTC Olmscheid

The Army will pay the state of Washington's Inspection and Maintenance (I/M) fees for its fleet even though state and local governments are exempt from paying this fee. Under Washington's State Implementation Plan (SIP), fleet operators can inspect their vehicles under the state's I/M program, but must purchase forms for certificates of compliance from Washington's Department of Ecology. The regulations exempt state and local government fleets from paying this fee, which goes to support the I/M program. Washington refused to grant the same exemption to Federal agencies.

Federal agencies objected to this provision of Washington's SIP when it was proposed, asserting that it illegally discriminated against the United States. The United States Environmental Protection Agency (USEPA) rejected these comments, citing U.S. v. South Coast Air Quality Management District, 784 F. Supp. 732 (C.D. Cal. 1990). The South Coast court held that a program that only exempted state and local government agencies from paying air district fees was constitutional because the waiver of sovereign immunity in the Clean Air Act specified that Federal agencies are to meet all requirements to the same extent and in the same manner as any non-governmental entity. The U.S. Department of Justice supports USEPA's position.

DID YOU KNOW . . . ? AT LEAST A QUARTER OF ALL PRESCRIPTIONS WRITTEN ANNUALLY IN THE U.S. CONTAIN CHEMICALS DISCOVERED IN PLANTS OR ANIMALS.

1997 Authorization Act and BRAC - MAJ Polchek

The National Defense Authorization Act for Fiscal Year 1997 has significant new provisions that may impact installations affected by base realignment and closure (BRAC) actions. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422 (1996).

Uncontaminated Property: In 1992, Congress passed the Community Environmental Response Facilitation Act (CERFA), Pub.L. No. 102-425, 106 Stat. 2174 (1992). CERFA amended section 120(h)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to provide for designation of certain property as uncontaminated. CERCLA, 42 U.S.C. §9620(h)(4) (1992). The uncontaminated property designation is significant as it allows for quicker transfer of property. The CERFA amendment defined uncontaminated property as real property upon which no hazardous substance or petroleum products "were stored for one year or more, known to have been released, or disposed of." Section 331 of the 1997 Authorization Act amends CERCLA section 120(h)(4) to change this definition by deleting the reference to storage for one year or more. As a result, more property can be designated as "clean" pursuant to CERCLA section 120(h)(4).

Although the 1997 Authorization Act amends the uncontaminated property definition in section 120(h)(4), the language "stored for one year of more" was not deleted from CERCLA section 120(h)(1). CERCLA, 42 U.S.C. §9620(h)(1) (1992). Section 120(h)(1) requires that notice be given in any deed if a hazardous substance or petroleum product was stored for one year or more on the property. The consequence of this provision is that, despite the amendment to section 120(h)(4), installations must still have some mechanism to identify property that stored these substances for more than a year so that the appropriate notice can be given in the transfer document. As most installations use the CERFA report process to identify where storage for more than a year has occurred, the change to section 120(h)(4) is likely to have little effect where the CERFA report is concerned. Installations are advised to continue using the CERFA report to identify storage for one year or more so that the appropriate notice can be given upon transfer.

Transfer Authority: Section 334 of the 1997 Authorization Act amends also CERCLA section 120(h)(3) to provide new authority for transfer of contaminated Federal property prior to remedial action. Prior to this amendment, CERCLA required that the remedy be in place and working before a transfer could take place. Section 334 provides that contaminated property eligible for transfer under this new authority must be suitable for the intended use by the transferee, and the use must be consistent with protection of human health and the environment. The transfer is further subject to concurrence by U.S. Environmental Protection Agency (USEPA) and/or state authorities.

This new authority has great potential for allowing early transfer of property where the local reuse authorities at BRAC sites are anxious to have the property. Given the problems with properly structuring the transfer, however, the Department of Defense will provide specific guidance on implementing this new authority. Until this guidance is final, section 334 may be used only on a case-by-case basis with approval of the Deputy Under Secretary of Defense for Environmental Security (DUSD(ES)).

DID YOU KNOW. . . ? THE COASTAL AREAS CONTAIN 90% OF THE OCEAN'S PLANT LIFE.

Migratory Bird Treaty Act - Mr. Farley

There has been a recent flurry of litigation against the U.S. Department of Agriculture's Forest Service (USFS) involving allegations that the USFS is violating the Migratory Bird Treaty Act (MBTA) by conducting timber harvests during nesting season in a manner that results in the death, and, therefore, the "take" of migratory birds. MBTA, 16 U.S.C. §§703, et. seq., (1989). Courts reviewing these cases have reached conflicting conclusions: some of these decisions have been favorable to the USFS, while others have resulted in injunctions barring proposed timber harvests.

Section 703, in conjunction with sections 704-712, of the MBTA makes it unlawful for any person, association, partnership, or corporation "by any means or manner, to pursue, hunt, take, capture, kill. . ." any migratory bird without first receiving a permit to do so. The MTBA's implementing Regulations do not specifically define the term "person" to include Federal agencies. The Regulations define "take" to include any of the following actions: "to pursue, hunt, shoot, wound, trap, capture, or collect." Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants, 50 C.F.R. §10.12 (1995).

The US Fish and Wildlife Service (USFWS) is responsible for issuing "take" permits and for enforcing the MBTA and its implementing regulations. While the MBTA does not provide for "incidental take" of migratory birds, the MBTA does authorize the USFWS to issue "special purpose" permits. MBTA, 16 U.S.C. §712(2), (1978) and Migratory Bird Permits, 50 C.F.R. §21.27 (1995). The "special purpose" permit is required before any person can lawfully take or otherwise possess migratory birds, their parts, nests, or eggs for any purpose not otherwise covered by the general permit regulations. Migratory Bird Permits, 50 C.F.R. §21.27(a) (1995). The USFWS does not have an official policy governing issuance of such permits to Federal agencies. Issuance of "special purpose" permits to Federal agencies, therefore, varies by USFWS Region, with some Regions choosing not to issue "special purpose" permits to Federal agencies.

While the USFWS does not have a policy of enforcing the MBTA against Federal agencies conducting timber management activities,[1] public interest groups are now attempting to obtain enforcement through the Federal judiciary and the threat of injunction. The validity of citizen suit enforcement against the Federal government and the applicability of the MBTA's prohibitions to Federal timber management activities remains unsettled given the conflicting court opinions mentioned above. However, it is possible that Army timber harvest activities, and similar ground-disturbing activities, could be disrupted as a result of the focus and attention presently being devoted to MBTA issues.

As a result, Environmental Law Specialists (ELSs) should ensure that, with respect to development of Integrated Natural Resource Management Plans and planning for timber related management activities, installation natural resources staff give due consideration to the impacts of activities, particularly proposed timber harvest activities, on migratory birds, especially for projects scheduled during nesting season. In addition, ELSs should require project officers to consider the impacts of proposed timber management activities, and similar ground-disturbing activities, on migratory birds in the environmental impact evaluation process supporting the project, including relevant NEPA documentation. As part of project review, project officers should provide the USFWS an opportunity to review and comment on any impact analyses dealing with migratory birds. Coordination efforts with USFWS, including opportunities for review and provision of comments should be documented and included in the administrative record supporting the project.

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[1] This general policy statement does not mean that the USFWS will not seek to enforce the criminal provision of the MBTA against Federal employees acting outside the scope of their duties. MBTA, 16 U.S.C. §707 (1986).

Additional action may be necessary in the future as a result of court decisions or action by the USFWS.

DID YOU KNOW. . . ? 99.5% OF THE EARTH'S FRESH WATER IS LOCATED IN THE POLAR ICECAPS AND GLACIERS.

New Cooperative Agreement Authority to Manage Cultural Resources - MAJ Ayres

The National Defense Authorization Act for Fiscal Year 1997 gives military land managers another tool to manage cultural resources on their installation. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422, Section 2862 (1996). The provision adds section 2684 to Chapter 159 of Title 10 of the Untied States Code to give the Secretary of Defense and the Secretaries of the military departments new authority to enter cooperative agreements. The cooperative agreements may be made with a "State, local government or other entity for the preservation, maintenance, and improvement of cultural resources on military installations and for the conduct of research regarding the cultural resources." *id.* All contemplated cooperative agreements benefitting Army installations under this new provision will be reviewed by the Environmental Law Division prior to being forwarded to the Secretary of the Army for signature.

Increasingly Aggressive Enforcement Climate Expected - CPT Anders

Army installations have been demonstrating markedly improved environmental compliance since passage of the Federal Facility Compliance Act (FFCA). FFCA, 42 U.S.C. §6901, nt. 1 (1992). In FY93, 58 fines were assessed against Army installations, 51 were assessed in FY94, 21 in FY95, and only 11 in FY96. Likewise, settlements are proceeding well, with 42 case settlements in FY96, the most in any fiscal year. But this is not the time to relax our excellent efforts.

The U.S. Environmental Protection Agency's (USEPA) FY95 Enforcement and Compliance Assurance Accomplishments Report demonstrates that improved compliance trends exist, albeit to a lesser degree, industry-wide. While these trends suggest both an effective USEPA enforcement program and earnest efforts within the regulated community to improve compliance, USEPA and the U.S. Department of Justice (DOJ) apparently view the decreased enforcement statistics as threatening to their enforcement offices. The Agencies have thus taken various measures to foster an increasingly intense enforcement environment.

A publication recently reported, "[t]his situation [of decreasing enforcement statistics] is reportedly causing some concern at DOJ, where some feel that the decreased environmental caseload may provide ammunition for congressional or administration budget cutters. . . ," and described DOJ's efforts to "protect against this possibility." Inside EPA, Vol. 17, No. 37 (September 13, 1996), p. 6. These concerns are echoed in USEPA's Office of Enforcement and Compliance Assurance (OECA), where OECA Chief Steve Herman and Deputy Assistant Administrator Sylvia Lowrance called a 27 September 1996 meeting with the Regional enforcement coordinators. At that meeting, Lowrance reportedly stressed that it is "critical that the Agency produce `healthy and robust' results in FY97." Inside EPA, Vol. 17, No. 40, October 4, 1996, p. 6. Herman and Lowrance openly stated at the meeting that "Regional offices will be held accountable for their performance in FY97," suggesting a heavy emphasis on results. These sentiments can be viewed as a resurgence of USEPA "bean-counting," despite Administrator Carol Browner's stated visions of quality over quantity regarding USEPA's general enforcement policy. See, *Environmental Law Division Bulletin*, Vol. 3, No. 11, August 1996, p. 4.

On 19 September 1996, the Administration proposed Senate Bill 2096, legislation that would intensify criminal enforcement measures in several ways. The legislation would (1) allow federal prosecution of environmental crimes even when the crime was stopped before the pollution occurs; (2) extend the maximum prison sentence for death or serious injury under most environmental statutes to twenty years; (3) extend the current five-year statute of limitations for prosecution of environmental crimes for up to three additional years if the polluter concealed the crime; (4) amend Federal restitution statutes by authorizing Federal courts to order convicted environmental criminals to pay the costs of the enforcement and the cleanup, and reimburse "victims," who include all members of a community; (5) add an "attempt" provision similar to those found in Federal drug laws, whereby undercover agents would be permitted to substitute benign substances for dangerous ones that would make some actions crimes; and (6) establish within USEPA a separate program for training state, local, and tribal law enforcement agents in conducting environmental crime investigations. Toxics Law Reporter, Vol. 11, No. 18 (October 2, 1996), pp. 533-34.

A recent USEPA Environmental Appeals Board (EAB) decision suggests that from a judicial standpoint, USEPA will follow this trend of increased scrutiny with a strict reading of the various administrative penalty policies. The EAB ruled that an administrative law judge (ALJ) erred in reducing an administrative penalty because the ALJ failed to apply properly the Resource Conservation and Recovery Act (RCRA) Civil Penalty Policy, and inappropriately lowered the assessed penalty based upon good-faith efforts to comply. In re Everwood Treatment Co., EPA EAB, RCRA (3008) Appeal No. 95-1, September 27, 1996, reported in, *Environment Reporter*, Vol 27, October 4, 1996, p. 1231. USEPA's June 1992 $500,000 penalty, based upon two violations of Alabama and Federal hazardous waste management requirements, was lowered to $59,700 by ALJ Spencer Nissen, after consideration of the low seriousness of the violations and Everwood's good faith efforts to comply. The EAB, however, ruled that Nissen erroneously calculated the gravity-based portion of the fine by properly analyzing the threat of harm to human health and the environment, but failing to assess the harm of the violations on the RCRA program in general. The EAB thus found that the potential for harm for the violations when calculating the gravity of the fine is "major." This finding not only increases the gravity-based portion of the fine between ten and twenty thousand dollars, but makes a multi-day enhancement of between $1000 and $5000 per violation per day (Everwood was in violation for 179 days) mandatory. This resulted in a base penalty determination by the EAB of $219,000. The EAB next analyzed whether Nissen appropriately gave Everwood a downward adjustment for good faith efforts to comply, for cleaning the spill site that led to the hazardous waste storage area. Not only did the EAB find that Everwood had not acted in good faith, but rather determined that the company's violations were willful, meriting a 25 percent upward penalty adjustment. EAB's final penalty assessment was $273,750, more than four times the ALJ's original finding.

Lead in Miniblinds - Ms. Fedel

On 25 June 1996, the U.S. Consumer Products Safety Commission (CPSC) released a consumer advisory for some window miniblinds manufactured in China, Taiwan, Mexico, and Indonesia. Miniblinds imported from these countries that are plastic and do not have a high-gloss finish may contain lead that can be hazardous to young children. CPSC has advised removing such miniblinds from housing in which young children live.

The U.S. Army Center for Health Promotion and Preventive Medicine (USACHPPM) has developed a Fact Sheet that provides guidance on steps that an installation should take to address this concern. The guidance recommends that lead-containing miniblinds be removed from installation facilities in which young children or pregnant women reside or are otherwise exposed to this hazard. The Fact Sheet is available by contacting the Industrial Hygiene Field Services Program at (410) 671-3118 (commercial), or 584-3118 (DSN), or (800) 222-9698. Installation environmental law specialists should also contact their installation's Directorate of Public Works for further information.